Petition

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81-1908

No.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

RICHARD RHEAUME,

Petitioner,

versus

ROBERT SAFFELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I

May a defendant in a federal civil rights action discharge the burden of persuasion on the issue of qualified immunity by showing "that he was acting in his official capacity and within the scope of his authority" thereby shifting to the plaintiff the burden of establishing that the defendant "lacked good faith?"

II

May a law enforcement officer, consistent with the guarantees of the Fourth and Fourteenth Amendments, incarcerate, prior to trial, a person who is arrested for a traffic offense that is not punishable by a period of confinement?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit are the following:

Richard Rheaume, *Petitioner*
Robert Saffell, *Respondent*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Richard Rheaume petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case insofar as it affirmed the judgment entered against him by the United States District Court for the Western District of Texas.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, App. A at 1a-14a, is reported at 666 F.2d 925 (5th Cir. 1982). The memorandum opinion of the United States District Court for the Western District of Texas, App. B at 15a-19a, is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit, App. C at 21a-22a, was entered on February 1, 1982. On March 1, 1982, the Court of Appeals denied a timely petition for a rehearing, App. D at 23a-24a. The Court of Appeals granted a stay of its mandate to and including April 15, 1982, so that a petition for a writ of certiorari could be filed, such stay to continue in force until the final disposition of the case by this Court. This petition for a writ of certiorari was filed within 90 days of the order of the Court of Appeals denying the petition for a rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA:
AMEND IV.:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMEND. XIV, § 1, cl. 2:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE, TITLE 42:
§ 1983 Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceedings for redress.

TEXAS REVISED CIVIL STATUTES:
ARTICLE 6687b:

> Sec. 13. Every person shall have an operator's, commercial operator's or chauffeur's license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of a magistrate or any officer of a court of competent jurisdiction or any peace officer. Any person who violates this Section shall be guilty of a misdemeanor and upon conviction thereof be punished by a fine of not more than Two Hundred Dollars ($200); . . .

ARTICLE 6701d:

> Sec. 147. Whenever any person is arrested for any violation of this Act punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:
>
> 1. When a person arrested demands an immediate appearance before a magistrate;
>
> 2. When the person is arrested upon a charge of negligent homicide;

3. When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

4. When the person is arrested upon a charge of failure to stop in the event of an accident, causing death, personal injuries, or damage to property.

5. In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided.

Sec. 148. (a) Whenever a person is arrested for any violation of this Act punishable as a misdemeanor, and such person is not immediately taken before a magistrate as hereinbefore required, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in court. Provided, however, that the offense of speeding shall be the only offense making mandatory the issuance of a written notice to appear in court, and only then if the arrested person gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer; and provided further, that it shall not be mandatory for an officer to give a written notice to appear in court to any person arrested for the offense of speeding when such person is operating a vehicle licensed in a state or country other than the State of Texas or who is a resident of a state or country other than the State of Texas.

ARTICLE 6701d-11:

Sec. 9. Every owner, driver or operator of a vehicle while it is upon the main traveled portion of the highway during the period from one-half hour after sunset to one-half hour before sunrise, and at any other time when there is not sufficient light to render clearly

discernible any person upon the highway from a distance of at least two hundred (200) feet ahead, shall keep lighted all lamps or lighting devices with which such vehicle is required to be equipped, whether the vehicle is in motion or not.

ARTICLE 6701d-11:

Sec. 15(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Act.

(b) Any person, corporation or receiver, who violates any provision of this Act shall, upon conviction, be punished by a fine of not more than Two Hundred Dollars ($200).

STATEMENT OF THE CASE

This case has as its genesis the decision of the respondent, Robert Saffell, a law enforcement officer of the Texas Department of Public Safety, to detain the petitioner overnight in the Travis County, Texas, jail to await a morning appearance before a magistrate on charges of driving without headlights, TEX. REV. CIV. STAT. art. 6701d-11, §9, and failure to possess a valid operator's license while operating a motor vehicle, TEX. REV. CIV. STAT. art. 6687b, §13, both misdemeanors for which Texas has not authorized a jail sentence as punishment, *see* TEX. REV. CIV. STAT. art. 6701d-11, §15(b); *id.* art. 6687b, §13.

The petitioner brought this action against Robert Saffell in the United States District Court for the Western District of Texas, claiming that his incarceration in the Travis County Jail violated his federally-protected civil rights.[1] A separate state law claim against Saffell for false imprisonment was appended to the federal civil rights claim.[2]

At trial, the petitioner testified that he had been stopped by an officer of the Department of Public Safety just after midnight for driving without his headlights on as he was proceeding north from Austin, Texas, on Interstate 35. Officer Saffell arrived on the scene shortly thereafter. In response to Saffell's questions as to why he was not using his headlights, and whether he had recently consumed intoxicating liquor, the petitioner explained that a mechanical problem prevented his using the headlights and said that he had

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[1]The petitioner brought this federal civil rights action under 42 U.S.C. § 1983. The subject matter jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331, 1343(3).

[2]The petitioner persuaded the Court of Appeals to vacate the District Court's directed verdict on the state law claim for false imprisonment. A writ of certiorari to review that much of the judgment of the Court of Appeals reversing the directed verdict entered by the District Court on the petitioner's state law claim is not sought. As a consequence, this petition includes only facts and legal analysis germane to the petitioner's federal civil rights claim.

consumed several drinks, but denied that he was intoxicated. Rheaume also stated that he was a resident of a nearby Austin suburb and produced both an employee card — indicating he was employed at IBM's Austin facility — and a Texas automobile registration. Rheaume had a current New York driver's license, but did not have a valid Texas driver's license.

Petitioner was then placed under custodial arrest by Saffell for driving while intoxicated, driving without headlights, and failure to have a valid Texas operator's license. He was taken to the Travis County Jail by Officer Saffell, where he was given a breathalizer test, which he passed. Officer Saffell then determined that no charge of driving while intoxicated would be filed, but did file charges for the other two offenses. No attempt was made by Officer Saffell to bring Rheaume immediately before an available magistrate, as required by state law, TEX. REV. CIV. STAT. art. 6701d, §§147, 148, before placing him in the Travis County Jail to await an appearance before a magistrate the following morning.

At the close of the petitioner's evidence, the District Court granted the respondent's motion for a directed verdict. *See* FED. R. CIV. P. 50(a). Relying on the Fifth Circuit's decision in *Perry v. Jones,* 506 F.2d 778, 780-81 (5th Cir. 1975), the Court held that even if Rheaume's state law right to be taken before a magistrate "immediately," *see* TEX. REV. CIV. STAT. art. 6701d, §§ 147, 148, had been violated by his overnight stay in the Travis County Jail, the violation was not of Constitutional proportion. App. B at 18a. The District Court then rejected Rheaume's argument that "a state law authorizing incarceration for offenses punishable by fine only violates federal due process rights." App. B at 18a. The Court explained that the petitioner had "confuse[d] punishment with custodial detention pending first appearance before a magistrate [and that a]n officer does not violate federal constitutional rights when he makes a custodial arrest for traffic violations." App. B at 18a.

On appeal, the Fifth Circuit focused first on the petitioner's contention that he was impermissibly punished by his 7-hour stay

in the Travis County Jail. The Court of Appeals recognized that the petitioner's argument — "that pretrial incarceration where there can be no post conviction incarceration creates an anomaly which is unconstitutional punishment" — raised a slightly different question than that addressed in *Perry v. Jones,* "where only 'immediacy' or lack of it was the issue presented to the Court." App. A at 8a, 10a & n.5, 666 F.2d at 929. The Court of Appeals, however, pretermitted its discussion of whether Rheaume's incarceration violated a federally-protected right, an issue the panel acknowledged had not been addressed by the Supreme Court. Instead, the Court held that "Saffell was entitled to qualified immunity from liability because he held a reasonable belief that his actions were lawful and within the scope of his authority." App. A at 8a & n.5, 666 F.2d 929-31 & 929 n.5.

In holding that Saffell was immune, the Court of Appeals applied its recent formulation of the burden of proof on a defendant in a civil rights action as set out in *Barker v. Norman,* 651 F.2d 1107 (5th Cir. 1981). Under *Barker v. Norman,* "once [a law enforcement] officer has shown that he was acting in his official capacity and within the scope of [his] authority 'the burden shifts to the plaintiff to breach the official's immunity by showing that the official lacked good faith.'" App. A at 9a, 666 F.2d at 930. Applying this test to its "o[wn] analysis of the evidence presented at trial," the Court of Appeals found "no evidence that in incarcerating Rheaume, Saffell, either subjectively or objectively, lacked good faith." App. A at 9a-10a, 666 F.2d at 930-31. As a result, the directed verdict entered by the District Court was affirmed.[3]

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[3]In discussing the state law claim for false imprisonment, *see* note 2 *supra,* the Court of Appeals indicated that the question of "reasonableness of Saffell's conduct under the Texas statute which requires that a person be taken immediately before a magistrate is one that, . . . should have been submitted to the jury." *See* App. A at 12a, 666 F.2d at 931.

REASONS FOR GRANTING THE WRIT

This petition presents for decision two significant questions — one involving the application of the federal civil rights statutes, the other of Constitutional dimension — both, as of yet, unanswered by the Court.

I

The definition of the burden of persuasion on a law enforcement officer pleading a defense of qualified immunity in a federal civil rights action as articulated by the United States Court of Appeals for the Fifth Circuit in *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981), and applied in the instant case, is at variance with decisions of the Third, Sixth, Eighth, Ninth, and District of Columbia Circuits.

Two terms ago, this Court made clear that a law enforcement officer named as a defendant in a civil rights action had the burden of pleading good faith in order to set up a defense of qualified immunity. *Gomez v. Toledo*, 446 U.S. 635 (1980). Last term, this Court wrote that "the burden is on the state official claiming immunity to demonstrate his entitlement." *Dennis v. Sparks*, 449 U.S. 24, 29 (1980). This case gives the Court an opportunity to settle a conflict between the Circuits by defining the burden of persuasion on a law enforcement officer pleading a defense of qualified immunity in a federal civil rights action.

In the instant case, the Fifth Circuit, following its prior decision in *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981), defined the burden of persuasion on the law enforcement officer as "show[ing] that he was acting in his official capacity and within the scope of [his] authority." App. A at 9a, 666 F.2d at 930 (*citing Barker*, 651 F.2d at 1121). Once this showing is made, the Fifth Circuit shifts the burden to the civil rights plaintiff to produce evidence of the defendant's lack of good faith. App. A at 9a, 666 F.2d at 930 (*citing Barker*, 651 F.2d at 1121). As the Fifth Circuit explained in *Barker v. Norman*, "[o]nce the official has shown that he was acting in his

official capacity and within the scope of his discretionary authority, the burden shifts to the plaintiff to breach the official's immunity by showing that the official lacked 'good faith.'" *Barker,* 651 F.2d at 1121.

The Fifth Circuit's decision in *Barker v. Norman* is in harmony with the decisions of other United States courts of appeals by initially placing the burden of persuasion on the law enforcement officer claiming a defense of qualified immunity in a civil rights action.[4] *See Thompson v. Burke,* 556 F.2d 231, 239 (3d Cir. 1977) (*quoting Skehan v. Board of Trustees,* 538 F.2d 53, 61-62 (3d Cir. 1976) (en banc)) ("in § 1983 actions the burden is on the defendant official claiming official immunity to come forward and to convince the trier of fact . . . official immunity should attach"); *Wolfel v. Sanborn,* 666 F.2d 1005, 1007 (6th Cir. 1981) (law enforcement officers have the "burden to prove . . . that they acted in good faith"); *Landrum v. Moats,* 576 F.2d 1320, 1329 (8th Cir.), *cert. denied,* 439 U.S. 912 (1978), *cited in Johnson v. Rogers,* 621 F.2d 300, 306 n.7 (8th Cir. 1980); *Gilker v. Baker,* 576 F.2d 245, 247

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[4]*Accord, Mays v. Scranton City Police Department,* 503 F. Supp. 1255, 1264 n.24 (M.D. Pa. 1980) ("The burden is on the defendant to prove by a preponderance of the evidence that qualified immunity should attach."); *Langton v. Maloney,* 527 F. Supp. 538, 548 (D. Conn. 1981) (action against various officials of Connecticut Department of Children and Youth Services) ("in order to avoid liability, a defendant to whom qualified immunity is available must show that he acted in good faith"); *Hutchings v. Erie City and County Library Board of Directors,* 516 F. Supp. 1265, 1272 (W.D. Pa. 1981) (suit against library officers and directors) ("the defendant bears the burden of proof"); *Doran v. Houle,* 516 F. Supp. 1231, 1236 (D. Mont. 1981) (action against state and federal officials) ("[t]he burden remains with the official claiming immunity to demonstrate 'that his conduct was justified by an objectively reasonable belief that it was lawful'"); *Friedman v. Weiner,* 515 F. Supp. 563, 567 (D. Colo. 1981) (§ 1983 action against university officials for unlawful employment practices) ("the burden is on the defendant to raise the defense and establish his entitlement to immunity"); *Soto v. Chardon,* 514 F. Supp. 339, 349 (D.P.R. 1981) (suit against Secretary of Education for Commonwealth) (collecting cases).

(9th Cir. 1978) ("[a] defendant can establish a defense by showing . . ."); *Dellums v. Powell,* 566 F.2d 167, 176 (D.C. Cir. 1977) ("police officers sued under Section 1983 . . . have available to them a qualified immunity defense, . . . but . . . the burden is on the defendant officer to prove it"), *cert. denied,* 438 U.S. 916 (1978).

The Fifth Circuit, however, is unique among the courts of appeals in shifting the burden of persuasion on the issue of qualified immunity to the plaintiff once the defendant has shown that he was acting in his official capacity and within the scope of his authority. *Accord, Tate v. Alexander,* 527 F. Supp. 796, 804 (M.D. Tenn. 1981) (defendant in civil rights action must establish a prima facie case by showing "that his challenged actions were within the scope of his discretionary authority"; thereafter, "plaintiffs must prove that [the defendant] is not entitled to the qualified immunity defense"). If this showing is made by the defendant, it then is incumbent on the plaintiff to show that the defendant lacked either objective good faith — "'knew or reasonably should have known that the action he took . . . would violate the constitutional rights' of the person affected" — or subjective good faith — "actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result" — in order to defeat the qualified immunity defense. *Barker,* 651 F.2d at 1121 (*quoting Bogard v. Cook,* 586 F.2d 399, 411-12 (5th Cir. 1978), *cert. denied,* 444 U.S. 883 (1979)).

None of the other United States courts of appeals that have considered the burden of persuasion on a defendant in a federal civil rights action — the Third,[5] Sixth,[6] Eighth,[7] Ninth,[8] and District

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[5]*Thompson v. Burke,* 556 F.2d 231 (3d Cir. 1977); *Skehan v. Board of Trustees,* 538 F.2d 53 (3d Cir. 1976) (en banc).

[6]*Wolfel v. Sanborn,* 666 F.2d 1005 (6th Cir. 1981).

[7]*Landrum v. Moats,* 576 F.2d 1320 (8th Cir.), *cert. denied,* 439 U.S. 912 (1978), *cited in Johnson v. Rogers,* 621 F.2d 300, 306 n.7 (8th Cir. 1980).

[8]*Gilker v. Baker,* 576 F.2d 245 (9th Cir. 1978).

of Columbia[9] Circuits — are in agreement with the formulation devised by the Fifth Circuit. As an initial matter, these courts do not allow for the shifting of the burden of persuasion to the plaintiff on the basis of a showing by the defendant. The burden of persuasion on the issue of qualified immunity is on the defendant at the beginning of the trial and the burden of persuasion remains on the defendant throughout.[10] *See Wolfel,* 666 F.2d at 1007; *Landrum,* 576 F.2d at 1329. Moreover, these courts of appeals have placed on the defendant in a federal civil rights action the "burden to prove . . . that [he] acted in good faith."[11] *Wolfel,* 666 F.2d at 1007. Thus, it is the defendant who must demonstrate "that he had no reasonable basis for knowing that his conduct would result in the overriding of another person's constitutional rights and that he acted in good faith," *Gilker,* 576 F.2d at 247 — a burden that the defendant may meet by "proving that he acted reasonably, in good faith, without malice, and with the state law in mind,"[12] *Thompson,* 556 F.2d at 239 (*citing Skehan,* 538 F.2d at 62) ("the district court must determine whether the defendants met their burden of establishing (1) that they did not know and reasonably need not have known that depriving [the plaintiff] of a pretermination hearing violated due process, and (2) that they acted without malicious intention to deprive him of his constitutional rights or cause him to suffer other injury"); *accord, Landrum* 576 F.2d at 1329; *Dellums,*

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[9]*Dellums v. Powell,* 566 F.2d 167 (D.C. Cir. 1977), *cert. denied,* 438 U.S. 916 (1978).

[10]*Accord, Doran,* 516 F. Supp. at 1236. *But cf. Smiddy v. Varney,* 665 F.2d 261, 266 (9th Cir. 1981) (action under § 1983 against employees of police department alleging that arrest and subsequent incarceration violated plaintiff's constitutional rights) ("to recover the plaintiff must clear two hurdles: probable cause must be shown not to have existed; the officers must be shown not to have reasonably believed in good faith that probable cause did exist").

[11]*Accord, Langton,* 527 F. Supp. at 548; *Hutchings,* 516 F. Supp. at 1272; *Soto,* 514 F. Supp. at 349.

[12]*Accord, United States* ex. rel. *Hoss v. Cuyler,* 452 F. Supp. 256, 297 (E.D. Pa. 1978).

566 F.2d at 176. Under the approach adopted by the Fifth Circuit, once the defendant demonstrates that he was acting in his official capacity and within the scope of his authority, the plaintiff must show that the official lacked good faith. *Barker,* 651 F.2d at 1121.

This conflict, concerning an important issue in the application of the federal civil rights statutes, justifies the grant of certiorari to review the judgment below.[13]

II

Whether a law enforcement officer may, consistent with the guarantees of the Fourth and Fourteenth Amendments, incarcerate, prior to trial, a person who is arrested for a traffic offense that is not punishable by a period of confinement presents an important issue of Constitutional law which has not been, but should be, settled by this Court.

The Fifth Circuit acknowledged that this case presented the unanswered question whether "pretrial incarceration where there can be no post conviction incarceration . . . is unconstitutional punishment." App. A at 8a & n.5; 666 F.2d at 929 & n.5.

The petitioner was the subject of a valid custodial arrest on charges of driving a motor vehicle without a valid operator's license, TEX. REV. CIV. STAT. art. 6687, § 13, driving a motor vehicle after dark without headlights, TEX. REV. CIV. STAT. art. 6701d-11, § 9, and on suspicion of driving while intoxicated. In this situation, there is not, nor could there be, a question that a law enforcement officer was entitled to "seize" the petitioner and remove him to the Travis County Jail so that a breathalizer test could be taken. There was probable cause to believe that the petitioner was intoxicated and the officer had every right to take

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[13] *See generally* Sowle, *Qualified Immunity in Section 1983 Cases: The Unresolved Issues of the Conditions for its Use and the Burden of Persuasion,* 55 TUL. L. REV. 326 (1981).

him into his custody for the purpose of administering a breathalizer test and deciding whether to charge him with driving while intoxicated.

However, once the breathalizer test had been "passed," and the law enforcement officer decided to charge the petitioner only with offenses that are not punishable by incarceration — driving without a valid operator's license, TEX. REV. CIV. STAT. art. 6687b, § 13 ("a fine of not more than Two Hundred Dollars"), and driving at night without headlights, TEX. REV. CIV. STAT. art. 6701d-11, § 9 ("a fine of not more than Two Hundred Dollars") — there is considerable question whether, consistent with the Fourth and Fourteenth Amendments to the Constitution, the respondent, having failed to immediately present the petitioner to an available magistrate, as is required by state law, TEX. REV. CIV. STAT. art. 6701d, §§ 147, 148, still had the option of incarcerating the petitioner overnight awaiting an appearance before a magistrate, rather than providing him with a written notice to appear in court. "[B]ecause he was incarcerated prior to his appearance before a magistrate — when incarceration after his appearance was not an option available under the regulations — Rheaume alleges he was unconstitutionally punished by this pretrial incarceration." App. A at 4a, 666 F.2d at 928.

Only last term Justice Stevens noted that "the Court has not directly considered the question whether 'there are constitutional limits upon the use of "custodial arrests" as the means for invoking the criminal process when relatively minor offenses are involved,'" *Robbins v. California*, ___U.S.___, ___ n.11, 101 S.Ct. 2841, 2858 n.11 (1981) (Stevens, J., dissenting) (*quoting* 2 W. LAFAVE, SEARCH AND SEIZURE § 5.2, at 290 (1978)). Earlier, Justice Stewart had indicated "that a persuasive claim might [be] made . . . that the custodial arrest of [a person] for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring). By granting the writ of certiorari this Court could "address specifically a current problem of considera-

ble seriousness: the arbitrariness and inequality which attends the unprincipled utilization of the 'custodial arrest' and citation alternatives." 2 W. LaFave, Search and Seizure § 5.2, at 290 (1978). Simultaneously, the Court could consider the Constitutional limits upon the use of pretrial incarceration for minor traffic offenses. *See also* 2 W. LaFave, Search and Seizure § 5.2, at 290 (1978); *see generally* Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests,* 48 U. Cin. L. Rev. 321 (1979).

The importance of this unsettled issue of Constitutional law justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Guy C. Fisher
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Attorney for Petitioner,
Richard Rheaume

Appendix

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 80-2349

RICHARD RHEAUME,

Plaintiff-Appellant,

v.

THE TEXAS DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Defendents-Appellees.

(Feb. 1, 1982)

Before GARZA and RANDALL, Circuit Judges.*

PER CURIAM:

Plaintiff-appellant, Richard Rheaume, appeals from a directed verdict in favor of Texas Department of Public Safety ("DPS") Officer Robert Saffell and DPS Director Wilson Spier. Rheaume had sued Saffell and Spier, alleging that Saffell's incarceration of Rheaume after arrest for three traffic violations violated his constitutional rights under the fourth, sixth and fourteenth amendments. Rheaume also included in his complaint an allegation of false imprisonment

* Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. 46(d).

based on Texas law. Jurisdiction was premised on 28 U.S.C. §§ 1331, 1343 and the doctrine of pendent jurisdiction. The district court granted a directed verdict in favor of both Saffell and Spier as to Rheaume's constitutional and pendent Texas state law claims. Rheaume then appealed the directed verdict only as to Saffell. We find that the district court's directed verdict on Rheaume's constitutional claim should be affirmed but that the directed verdict on the state claim of false imprisonment was improper as that issue should have been submitted to the jury. We therefore vacate the judgment of this district court as to the state law claim of false imprisonment and remand the case to the district court for proceedings consistent with this opinion.

I. Facts

On January 26, 1979, a few minutes after midnight, Rheaume was stopped by a DPS trooper north of Austin, Texas, for driving on an interstate highway without his headlights turned on. Saffell arrived on the scene and questioned Rheaume as to why he was not using headlights and whether he had recently consumed intoxicating liquor. Rheaume explained that a mechanical problem prevented his using the headlights and responded affirmatively that he had been drinking. When asked by Saffell, Rheaume was unable to produce a valid Texas operator's license but stated that he was a resident of Austin and produced an IBM employee card indicating that he worked at IBM's Austin facility. Additionally, the automobile he was driving was registered to him in Texas.

Rheaume was then placed under custodial arrest by Saffell for driving while intoxicated, driving without his headlights turned on and failure to have a valid Texas operator's license.[1] He was taken to the Travis County jail where a

1. Under the Texas traffic regulations, driving while intoxicated, driv-

breathalizer test was administered. Rheaume registered .08 blood/alcohol level on the test, a result below the level of .10 at which a presumption exists that a person is intoxicated. Officer Saffell determined that no charge of driving while intoxicated would be filed but did file charges for the other two violations. Saffell, after determining not to release Rheaume with a citation to appear for a hearing on the other charges at a later date, inquired of the jail personnel whether a magistrate had made his nightly call at the jail in order for Rheaume to appear before him for disposition of the two offenses. When told that the nightly visit had already been made, without attempting to contact the magistrate by phone, Saffell placed Rheaume in jail to await a morning appearance before the magistrate. Rheaume remained in jail from approximately 2:00 a.m. until he had appeared before and was released by a magistrate at approximately 9:00 a.m. the next day. At Rheaume's appearance, the magistrate waived any fine against him for driving without headlights because of the time he had already spent in jail and levied a fine against him for failure to have a valid Texas operator's license. Rheaume was then released from jail. Rheaume subsequently brought action against Saffell and Spier under 42 U.S.C. § 1983, claiming that his seven hour incarceration violated his constitutional rights under the fourth, sixth and fourteenth amendments in that he was subjected to impermissible punishment without due process of law. Rheaume alleged that, under Texas law, the violations with which he was charged, driving without headlights and failure to possess a Texas operator's license, were misdemeanors which, under the Texas traffic regulations, could be punished only

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ing without headlights and failure to possess a valid Texas operator's license are offenses for which custodial arrest is proper if the arrestee is brought immediately before a magistrate for an appearance. See note 2 and note 3, infra.

by fine, not incarceration.[2] Thus, because he was incarcerated prior to his appearance before a magistrate—when incarceration after his appearance was not an option available under the regulations—Rheaume alleges he was unconstitutionally punished by this pretrial incarceration. Rheaume further asserts that, under Texas law[3] which requires that a person be taken immediately before a magistrate, his seven

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2. The Texas traffic regulations provide:

> Every person shall have an operator's . . . license in his immediate possession at all times when operating a motor vehicle and shall display the same upon demand of . . . any peace officer. Any person who violates this Section shall be guilty of a misdemeanor and upon conviction thereof be punished by a fine of not more than Two Hundred Dollars ($200.00). . . .

Tex.Rev.Civ.Stat.Ann. art. 6687b, § 13 (Vernon 1977).

> Every owner, driver or operator of a vehicle while it is upon the main traveled portion of the highway during the period from one-half hour after sunset to one-half hour before sunrise, and at any other time when there is not sufficient light to render clearly discernible any person upon the highway from a distance of least two hundred (200) feet ahead, shall keep lighted all lamps or lighting devices with which such vehicle is required to be equipped, whether the vehicle is in motion or not.
>
> . . . .
>
> (a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of this Act.
>
> (b) Any person, corporation or receiver, who violates any provision of this Act shall, upon conviction, be punished by a fine of not more than Two Hundred Dollars ($200.00).

Tex.Rev.Civ.Stat.Ann. art. 6701d-11, §§ 9, 15 (Vernon 1977).

3. The pertinent Texas statute states:

> Sec. 147. Whenever any person is arrested for any violation of this Act punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:

hour incarceration was unreasonable within the statute and he was thus subjected to false imprisonment. Defendant Saffell and Spier answered, denying Rheaume's constitutional and state law claims. Saffell additionally pleaded a "qualified immunity" defense as to the constitutional claim.

The case proceeded to trial. At trial, the magistrate who had been on call on January 26, 1979, testified that he sometimes was called after his nightly rounds and that he had handled offenses such as Rheaume's by telephone in the past. At the close of Rheaume's case-in-chief, Saffell and Spier

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1. When a person arrested demands an immediate appearance before a magistrate;

2. When the person is arrested upon a charge of negligent homicide;

3. When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

4. When the person is arrested upon a charge of failure to stop in the event of an accident, causing death, personal injuries, or damage to property;

5. In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided.

Sec. 148. (a) Whenever a person is arrested for any violation of this Act punishable as a misdemeanor, and such person is not immediately taken before a magistrate, as hereinbefore required, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in court. Provided, however, that the offense of speeding shall be the only offense making mandatory the issuance of a written notice to appear in court, and only then if the arrested person gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer; and provided further, that it shall not be mandatory for an officer to give a written notice to appear in court to any person arrested for the offense of speeding when such person is operating a vehicle licensed in a state or country other than the State of Texas or who is a resident of a state or country other than the State of Texas.

Tex.Rev. Civ.Stat.Ann. art. 6701d, §§ 147, 148 (Vernon 1977).

moved for and the district court granted a directed verdict on both the state and federal claims, finding that Rheaume did not have a federal constitutional claim on the question whether he was taken "immediately" before a magistrate, that he had not been punished by his confinement, and that, under the district court's interpretation of Texas law, he had been immediately taken before a magistrate. The court also found that, even if Saffell had been liable, there had been no showing that Spier had any policy of encouraging custodial arrest or detention for traffic violations and thus Spier, as Saffell's superior, could not be liable.[4] The court, having determined that Rheaume had failed to establish his constitutional and state claims, did not address Saffell's qualified immunity claim.

On appeal, Rheaume questions the propriety of the court's directed verdict as to Saffell on the federal and state claims. He does not, however, address whether Saffell was entitled to a qualified immunity defense should we find any valid constitutional claim.

II. Rheaume's Constitutional Allegations

We begin our review of the directed verdict granted to Saffell mindful of the standard enunciated by this court in *Boeing v. Shipman,* 411 F.2d 365 (5th Cir. 1969). We must consider all of the evidence presented—not just the evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the directed verdict. If the facts and inferences point so strongly and overwhelmingly in favor of one party

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4. The district court held that Spier's liability could not, under the Civil Rights Act, be predicated on vicarious liability. Because Rheaume does not appeal the directed verdict as to Spier we express no opinion as to the propriety of this ruling.

that we believe that reasonable men could not arrive at a contrary verdict, we are to determine that the granting of the motion for directed verdict was proper. On the other hand, if there is substantial evidence opposed to the motion for directed verdict, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion for directed verdict should have been denied, and the case submitted to the jury. 411 F.2d at 375.

Rheaume's assertion of the violation of his constitutional rights is premised on the concept that he was impermissibly punished by his seven hour incarceration in the Travis county jail. Rheaume relies on the decision of the United States Supreme Court in *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), to support his position. In *Bell,* the Court examined the conditions of confinement for pretrial detainees in New York City, holding that, where pretrial restriction was reasonably related to a legitimate non-punitive governmental objective, such detention did not, without more, amount to punishment. Rheaume argues, however, that because Officer Saffell was aware that he was a resident of Austin, that he was employed in Austin and that he had Texas license plates on his car, his incarceration was not in furtherance of a legitimate state interest of assuring his attendance at a hearing on the charges and thus amounted to punishment under the *Bell* standard.

This argument, as presented, raises a slightly different question than that addressed by this court when construing the Texas custodial arrest and appearance statutes as to their constitutionality. Previously we have been faced with the question whether the right to a "immediate" hearing before a magistrate according to the requirements of Texas state law was of constitutional dimension under the due process clause, holding consistently that it was not. *Perry v. Jones,*

506 F.2d 778, 780–81 (5th Cir. 1979). *See Anderson v. Nosser,* 438 F.2d 183 (5th Cir. 1971). Rheaume's argument, that pretrial incarceration where there can be no post conviction incarceration creates an anomaly which is unconstitutional punishment, seems to differ from that presented in prior cases, *see Perry v. Jones*, supra, where only "immediacy" or lack of it was the issue presented to the court.[5]

In reviewing whether the district court's disposition of Rheaume's constitutional claim should be affirmed, we first note the district court's determination of the issues before us. The district court determined that whether Rheaume was taken immediately before a magistrate was not, according to the decisions of this court, of constitutional dimension, further finding that Rheaume's incarceration was "custodial detention pending first appearance before a magistrate" rather than punishment. The court did not, however, address the question whether there was a legitimate state objective to be gained by the incarceration so as to avoid any indices of punishment as articulated in *Bell*. Additionally, because the district court found that Rheaume had no constitutional claim, it did not reach the question whether, given any constitutional claim by Rheaume, Saffell was entitled to qualified immunity from liability because he held a reasonable belief that his actions were lawful and within the scope of his authority.

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5. Decisions by the Supreme Court have additionally not addressed this question. Justice Stevens has recently stated: "[T]he Court has not directly considered the question whether 'there are constitutional limits upon the use of "custodial arrests" as the means for invoking the criminal process when relatively minor offenses are involved.' " *Robbins v. California,* _____ U.S. _____, _____, n.11, 101 S.Ct. 2841, 2858, n.11, 69 L.Ed.2d 744, 1981. While Justice Stevens stated that a person arrested for a misdemeanor may be placed temporarily in custody, *id.*, his statements indicate that the constitutional ramifications of the length of custody and incarceration, particularly in the context of impermissible punishment, have not been clearly delineated.

We have recently had occasion to discuss the concept of the qualified immunity available to police officers when charged with constitutional violations. *Barker v. Norman*, 651 F.2d 1107, 1120–1122 (5th Cir. 1981); *Fowler v. Cross*, 635 F.2d 476 (5th Cir. 1981). An officer who reasonably believes that his actions are lawful is entitled to immunity from liability if he pleads such immunity unless it can be shown by the plaintiff that the officer lacked good faith. *Barker v. Norman*, 651 F.2d at 1120. We need not repeat our complete analysis here; we need only reiterate that once the officer has shown that he was acting in his official capacity and within the scope of authority, "the burden shifts to the plaintiff to breach the official's immunity by showing that the official lacked good faith." 651 F.2d at 1121 (citations omitted). There "are both objective and subjective components to this good faith," *id.*, a showing of a breach of either leading to a finding of no immunity.

A review of the trial transcript and briefs of the parties indicates that Rheaume has never alleged lack of good faith to controvert Saffell's affirmative defense of qualified immunity. Even if he had, such a challenge would be futile. The evidence demonstrates that Saffell had legal authority to initially make the custodial arrest and to conduct the breathalizer test. Moreover, there is no evidence that, in incarcerating Rheaume, Saffell, either subjectively or objectively, lacked good faith.

The subjective lack of good faith, that is, that the police officer acted with malicious *intent*, may be shown by proof

> that an official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result.

651 F.2d at 1121. There is no evidence in the transcript of the trial, in the brief on appeal or in argument presented orally to

this court, of malicious intent on the part of Saffell to harm Rheaume, *i.e.*, to inflict punishment on him.

Additionally, objective proof of the lack of good faith, that Saffell knew or should have known that the action he took violated Rheaume's constitutional rights, is wholly absent.

> [A]n official is liable under section 1983 "if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights" of the person affected. The fulcrum . . . is the existence, at the time of the official's action, of clearly established judicial decisions that make his action unconstitutional.

651 F.2d at 1121. An examination of the law applicable to this case does not reveal any established judicial decisions on which lack of good faith by Saffell could be predicated. Considering that the question of immediate presentation to a magistrate had been determined by this court not to be a constitutional claim, *Perry v. Jones*, supra, and that the question of detention as punishment had not been addressed by this or any other court, Saffell cannot, from the record presented, be objectively charged with knowledge that his action violated Rheaume's constitutional rights.

From a review of the case law relevant to Rheaume's constitutional claim and our analysis of the evidence presented at trial, it is clear that, under this court's precedent, Saffell would have been entitled to a good faith defense to this arguable constitutional claim presented by Rheaume. We thus need not decide what is, at best, a questionable constitutional claim, as Saffell's qualified immunity defense would have been an appropriate basis for the district court's decision and is the basis upon which we affirm the directed verdict as to Rheaume's constitutional claim.

III. The Texas State Law Claim of False Imprisonment

Rheaume's constitutional argument, which we do not decide because of Saffell's qualified immunity, does present a "substantial constitutional question upon which the district court could exercise its pendent jurisdiction as to the state law claims of false imprisonment." *Jackson v. Stinchcomb*, 635 F.2d 462, 471 (5th Cir. 1981). The district court, by addressing the merits and granting a directed verdict on the state law claim, clearly and properly exercised its pendent jurisdiction on this false imprisonment claim. The twofold question before us then is whether that directed verdict was proper and, if improper, what course of action the district court should take as to the state law claim upon remand.

As to the first question, we find that the decision of the district court to grant the directed verdict on the Texas state law claim was improper. The court, in support of its directed verdict, cited several decisions of Texas courts in which the word "immediate" as it applies to appearance before a magistrate had been construed. In those cases, detention for several hours had been construed not to violate the immediate appearance requirement. The court, however, failed to note a decision by this court construing a situation where the question of "immediate" presentation to the magistrate had been held to be one for the jury. *Roberts v. Bohac*, 574 F.2d 1232 (5th Cir. 1978). In *Roberts*, strikingly similar to the case before us, the plaintiff was arrested and jailed after a magistrate had made his night rounds. No attempt was made to notify the magistrate even though there was testimony that he might have been available after rounds. A jury verdict on the state law claims in favor of the plaintiff was upheld by this court. The question important to the court in its affirmance of the false imprisonment verdict was the reasonableness of the police conduct in not contacting a magistrate. Implicit in the affirmance was that failure to contact a magistrate could be unreasonable. 574 F.2d at 1233. Here, the

magistrate testified that he had, on prior occassions, dealt with misdemeanor offenses over the telephone and Officer Saffell testified that he did not even attempt to contact the available magistrate to determine whether or not Rheaume's appearance could be handled telephonically. Thus, the question of reasonableness of Saffell's conduct under the Texas statute which requires that a person be taken immediately before a magistrate is one that, under *Roberts*, should have been submitted to the jury. Under the *Boeing v. Shipman* standard, the court's failure to submit the state law claim of which it had assumed pendent jurisdiction was erroneous.

Having reversed only as to the state law claim, the final question before us is the disposition of the state law claim on remand. As we have noted, the court assumed pendent jurisdiction to hear the state law claim. That assumption of pendent jurisdiction was within the discretion of the trial court. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Even at this stage of the proceeding, on remand, the district court has the discretion to retain or to dismiss the state law claim. *See United Mine Workers*, 383 U.S. at 727, 86 S.Ct. at 1139; *In Re Carter*, 618 F.2d 1093, 1102 (5th Cir. 1980). We note that at least one factor should be considered by the district court on remand. Should there be a dismissal by the district court, there may be a question whether Rheaume would have access, in light of the applicable Texas statute of limitations, to state court.[6] Because it is within the discretion of the district court to determine whether to retain or dismiss the pendent state law claim, we need not decide this question; rather, it is for the district court, in the first instance, to request appropriate briefing and argument from the parties and to exercise its discretion in light of the answer to the question of the availability of a state forum. The government, post argument,

6. The applicable period of limitations would, of course, be governed by Texas law.

alleged that Rheaume could file his claims in state court because the Texas savings statute[7] would allow refiling of Rheaume's false imprisonment claim in state court within sixty days after the federal district court dismissed Rheaume's state claim. We do not intimate that its position is correct; we simply note to the district court that the law of this circuit indicates that where a litigant who has properly been in federal court is later time barred from using the state courts to litigate his pendent claim, the court "should exercise its pendent jurisdiction." *Henson v. Columbus Bank and Trust Company*, 651 F.2d 320, 325 (5th Cir. 1981); *Pharo v. Smith*, 625 F.2d 1226, 1227 (5th Cir. 1980) ("That a plaintiff's state law claim will be time barred if dismissed is certainly a factor, if not a determinative factor, a district court should consider in deciding whether to maintain jurisdiction over pendent state claims. . . .") *See also O'Brien v. Continental Illinois National Bank and Trust Company*, 593 F.2d 54, 63–65 (7th Cir. 1979). Moreover, according to *Henson*, if the district court determines that the pendent claim should be dismissed by the federal court and Rheaume later discovers that his case is time barred in the state court, the federal district court should grant a motion for reconsideration of whether or not the federal court will exercise its pendent jurisdiction to hear the state law claim. 651 F.2d at 325.

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7. The Texas savings statute provides:

> When an action shall be dismissed in any way or a judgment therein shall be set aside or annulled in a direct proceeding, *because of a want of jurisdiction of the Trial Court in which such actions shall have been filed,* and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement of the second Court shall not be counted as part of the period of limitations unless the opposite party shall in abatement show the first filing to have been an intentional disregard of jurisdiction.

Tex.Rev.Civ.Stat.Ann. art. 5539a (Vernon 1958) (emphasis added).

The directed verdict on Rheaume's constitutional claim is affirmed because of Saffell's qualified immunity. The judgment of directed verdict as to Rheaume's state law claim is vacated and the case is remanded to the district court for proceedings consistent with this opinion.

Saffell shall bear the costs of this appeal.

AFFIRMED IN PART, VACATED IN PART and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
Austin Division

Richard Rheaume

v.

Wilson E. Speir and
Robert Saffell

No. A-79-CA-115

MEMORANDUM OPINION

This cause came on for trial by Jury on October 15, 1980. At the close of Plaintiff RICHARD RHEAUME's case-in-chief, the Court granted a motion for judgment in favor of all Defendants.

The uncontroverted evidence showed that on January 26, 1979, RHEAUME stopped by the Marriott Hotel in Austin, Texas and had several drinks with friends. When RHEAUME left the hotel shortly after midnight to return to his home in Round Rock, he discovered that he had car trouble, but managed to jump-start the car. When RHEAUME turned on his headlights, however, the car lost power. Therefore, RHEAUME started north on Interstate Highway 35 with only his parking lights on.

Approximately three miles down the road, a patrolman stopped RHEAUME. RHEAUME could not produce a valid Texas driver's license, although he did show the officer a New York State driver's license and an invalid temporary Texas

driver's license. (RHEAUME moved to Texas in June, 1978, and had failed to obtain a permanent Texas license after his temporary permit expired.)

Defendant ROBERT SAFFELL, an officer with the Texas Department of Public Safety, eventually took over for the patrolman who initially stopped RHEAUME. SAFFELL arrested RHEAUME for driving without headlights, driving without a valid Texas driver's license, and for investigation of driving while intoxicated. At the Austin police station, RHEAUME took a breathalyzer test, which showed, .08% alcohol in his blood. [.10% creates a legal presumption of intoxication. V.A.T.S. §6701 1-5 (1977).]

RHEAUME does not challenge any of SAFFELL's actions up until the time RHEAUME "passed" the breathalyzer test. RHEAUME expected to be released at that time. Instead of permitting RHEAUME to sign a written notice to appear to answer to the headlight and driver's license charges, and then releasing him that night, SAFFELL allowed RHEAUME to be booked into the jail, where RHEAUME remained until 8:30 a.m., when he was taken before a magistrate.

RHEAUME attacks the legality of his six-hour stay in jail on both state and federal grounds. First, he argues that state law does not authorize incarceration of persons charged with offenses punishable by fine only, and that he was falsely imprisoned because he was not taken before a magistrate "immediately" as required by state law. Second, RHEAUME says that a state law authorizing incarceration for offenses punishable by fine only violates his federal due process rights.

The offenses of driving without headlights and driving without a valid license are both punishable by a fine of $200 or less. Although imprisonment is not authorized as a punishment for these violations, the six-hour custody complained of in this case was detention pending first appearance before a magistrate.

Contrary to RHEAUME's argument, Texas permits its police officers to arrest persons and take them into custody for any traffic violation other than speeding. *Tores v. State,* 518 S.W.2d 378 (Tex. Crim App., 1975); V.A.T.S. Art. 6701(d) §§147 & 148. Section 147 does provide, however, that a person arrested for a misdemeanor traffic offense "shall be immediately taken before a magistrate. . . ."

In the instant case, RHEAUME was taken into custody after 12:30 a.m. and booked into the jail by 2:15 a.m., when he says he should have been released or taken immediately before a magistrate. Testimony introduced by RHEAUME showed that magistrates would be available for first appearances until 10:30 p.m. during weeknights; after that time, magistrates did not become available again for first appearances until between 8:00 a.m. and 9:00 a.m. the following morning.

Texas courts have construed the word "immediately" in the context of §147 to mean "with due diligence". "While courts must safeguard the rights of individuals, they should not impose liability upon peace officers for delays which are reasonable under all the circumstances." *Hicks v. Matthews,* 266 S.W.2d 846 (Tex. 1954).

A person arrested late at night when a magistrate is unavailable can be detained until a magistrate is available the next morning without violating the detained person's right to be taken before a magistrate "immediately". *See Hokr v. State,* 545 S.W.2d 463, 465 (Tex. Crim App. 1977); *Fouraker v. Kidd Springs Boating and Fishing Club,* 65 S.W.2d 796 (Tex. Civ. App. - Dallas 1933, no writ). Texas law does not require that an arresting officer choose the least restrictive alternative in handling a person arrested for a traffic violation. (V.A.T.S. Art. 6601(d) §148 provides ". . .that the offense of speeding shall be the only offense making mandatory the issuance of a written notice to appear in court . . .") Since RHEAUME's detention was not for the purpose of

punishment, and since he was taken before a magistrate "immediately" within the meaning of Texas law, his state claims fail.

RHEAUME's federal claims fare no better. Even had SAFFELL violated RHEAUME's state law right to be taken before a magistrate "immediately", RHEAUME would have no federal constitutional claim against SAFFELL on that basis. *Perry v. Jones,* 506 F.2d 778, 780–781 (5th Cir. 1975).

The other argument offered—that as a matter of federal constitutional law a person cannot be imprisoned for committing a misdemeanor that can be punished by fine only—again confuses punishment with custodial detention pending first appearance before a magistrate. An officer does not violate federal constitutional rights when he makes a custodial arrest for traffic violations. *See United States v. Duckett,* 583 F.2d 1309 (5th Cir. 1978); *Mendoza v. United States,* 365 F.2d 268 (5th Cir. 1966). Thus, SAFFELL did not violate RHEAUME's federal constitutional rights by taking RHEAUME into custody, then down to the county jail for a breathalyzer test, and leaving RHEAUME there pending first appearance before a magistrate.

Liability against Colonel Wilson Speir for violation of federal rights cannot be predicated on the doctrine of vicarious liability. The only evidence introduced by RHEAUME showed that custodial arrests for traffic violations were uncommon. None of the evidence presented tended to indicate that SPIER had a policy of encouraging such custodial arrests in general, or encouraged or exercised control over SAFFELL in his conduct in this case. Nor was there proof that SPEIR was the director of, or an employee of, the Texas

Department of Public Safety at the time of this incident. Even if SAFFELL himself were liable, therefore, SPEIR would not share SAFFELL's liability.

SIGNED this 14th day of November, 1980.

/s/ LUCIUS D. BUNTON
United States District Judge

APPENDIX C

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 80-2349

D. C. Docket No. CA-A-79-115

RICHARD RHEAUME,

Plaintiff-Appellant,

v.

THE TEXAS DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Defendents-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before GARZA and RANDALL, Circuit Judges.*

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

* Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. §46(d).

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; vacated in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is futher ordered that defendant-appellee, Robert Saffell, pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

February 1, 1982

APPENDIX D

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 80-2349

D. C. Docket No. CA-A-79-115

RICHARD RHEAUME,

Plaintiff-Appellant,

v.

THE TEXAS DEPARTMENT OF PUBLIC SAFETY, ET AL.,

Defendents-Appellees.

Appeal from the United States District Court for the Western District of Texas

(March 1, 1982)

Before GARZA and RANDALL, Circuit Judges.*

* Due to his death on December 22, 1981, Judge Ainsworth did not participate in this decision. The petition for rehearing is being decided by a quorum. 28 U.S.C. §46(d).

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ _____
UNITED STATES CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of April, 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mark White, Attorney General for the State of Texas, P.O. Box 12548, Capitol Station, Austin, Texas, 78711, Counsel for the Respondent. I further certify that all parties required to be served have been served.

GUY C. FISHER
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Attorney for Petitioner,
Richard Rheaume

Opposition

Office - Supreme Court, U.S.
FILED
JUN 2 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1908

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

RICHARD RHEAUME,

Petitioner

V.

ROBERT SAFFELL,

Respondent

* * *

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 81-1908

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

* * *

RICHARD RHEAUME,

Petitioner

V.

ROBERT SAFFELL,

Respondent

* * *

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

OPINIONS BELOW

The opinions of the Fifth Circuit Court of Appeals and the United States District Court for the Western District of Texas appear as Appendices A and B to the Petition for Writ of Certiorari. The former is also published as *Rheaume v. Texas Dept. of Public Safety*, 666 F.2d 925 (5th Cir. 1982); the later is unpublished.

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1254 (1). The first issue presented by Petitioner, however, was not raised or addressed by the court below. This Court has no jurisdiction to consider that issue and the remaining issue is not factually developed for proper presentation to this Court.

QUESTION PRESENTED

Is Respondent entitled to a good faith immunity defense under the circumstances presented in this case?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies on the Fourth and Fourteenth Amendments of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was stopped by Texas Department of Public Safety troopers for driving on an interstate highway on or about midnight without headlights after leaving a bar without turning on his headlights. When stopped, Petitioner was unable to produce a Texas driver's license.[1] (Tr. 97).[2] Upon questioning Petitioner, Respondent concluded that Petitioner was intoxicated because of the odor of alcohol on his person, his admis-

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1. Contrary to the contentions in Petitioner's statement of facts, Petitioner did not produce a Texas automobile registration.(Tr. 70).

2. For brevity, the following abbreviations will be used to refer to the record: Tr. refers to the transcript of the trial proceedings which appear at number 58 of the record on appeal; Depo. refers to the deposition of Respondent Robert Saffell which appears as number 13 in the record on appeal; and Exhibit refers to Petitioners's exhibits introduced and admitted into evidence at trial.

sion of having had several drinks, his bloodshot eyes, his staggering gait, and his use of poor judgment in driving on a highway without headlights. (Depo. 14-15).

Petitioner was charged with driving while intoxicated, (D.W.I.), driving without a valid Texas driver's license and driving without headlights. (Depo. 96-97). Petitioner consented to being taken to the Travis County Jail by Trooper Saffell for a breathalyzer test. (Tr. 97). Petitioner registered .08 blood/alcohol level on the test and was charged with driving without headlights and driving witout a valid Texas driver's license. (Tr. 103). Testimony was introduced by Petitioner that a magistrate makes jail call between 10:30 p.m. and 11:00 p.m. and would not return until 8:30 the following morning. (Tr. 138-139, 145). Respondent inquired the night in question as to the availability of a magistrate and was informed that he had already made his evening visit. (Tr. 115-116). Petitioner was subsequently booked into the Travis County Jail at 2:15 a.m.; seen by a magistrate at 8:50 a.m.; and released from custody at 9:20 a.m. on the same day. (Exhibit 4).

Petitioner brought suit against Respondent and the former Director of the Texas Department of Public Safety, Wilson E. Speir. Petitioner alleged at trial that his incarceration pending the availability of a magistrate was violative of his constitutional rights in that it constituted summary punishment without due process of law. Petitioner also alleged a state court cause of action for false imprisonment.

The United States District Court granted a judgment in favor of both defendants at the close of Petitioner's case in chief. The court found that Petitioner had been arrested and detained in accordance with state law and that Petitioner had no constitutional right to be taken before a magistrate immediately and in any event Petitioner was taken before a magistrate in accordance with

state law. The court further found that no judgment could be had against Wilson Speir as Petitioner had offered no proof that Speir was Director of, or even an employee of, the Texas Department of Public Safety at the time of the arrest.

The Fifth Circuit Court of Appeals affirmed the dismissal of the constitutional claim concluding that Respondent was entitled to good faith immunity for his actions. The court did not reach the merits of the constitutional claim. The appellate court, however, remanded the state tort claim to the district court for consideration whether the court should exercise pendent jurisdiction over the state law claims. The district court has conducted a hearing to determine whether after a dismissal of Petitioner's claim, Petitioner could proceed in state court. A review of Tex. Rev. Civ. Stat. Ann. art. 5539a reveals that the limitations period has been tolled so as to allow Petitioner to proceed in state court on his state tort claims.[3]

ARGUMENT

I.

IRRESPECTIVE OF ALLOCATION OF THE BURDEN OF PROOF ON THE ISSUE OF QUALIFIED IMMUNITY, RESPONDENT WAS ENTITLED TO QUALIFIED IMMUNITY.

This Court has long held that "a police officer is not charged with predicting the future course of constitutional law." *Pierson v. Ray,* 386 U.S. 547, 557, (1967). *See also Wood v. Strickland,* 420 U.S. 308, 322 (1975). This principle is the basis for the qualified immunity defense afforded public officials in discharging their duties. Under the *Wood v. Strickland* two pronged test,

3. See Appendix A.

a government employee acting in his official capacity is entitled to official immunity unless: (1) the constitutional right allegedly infringed by him was clearly established at the time of the challenged conduct, if he knew or should have known of that right, and if he knew or should have known that his conduct violated the constitution; or (2) if the official acted with "malicious intention" to deprive Petitioner of a constitutional right or to cause him other injury. *Wood v. Strickland*, 420 U.S. at 322. Which party has the burden of proof once the official has raised the defense of qualified immunity is irrelevant in this action as the evidence irrefutably establishes that Respondent was entitled to good faith immunity.

Respondent's immunity defense cannot be abrogated under the subjective prong of the *Wood v. Strickland* standard. Petitioner has never and does not now challenge the initial custodial arrest. (Petition for Writ of Certiorari at 13-14). Petitioner concedes that there was probable cause for the arrest and that Respondent had authority to take him into custody. *Id.* Petitioner challenges only his custody subsequent to the administration of the breathalyzer test. At trial, Petitioner did not contend that Respondent acted with malicious intent to harm him and did not introduce any evidence remotely suggesting the lack of subjective good faith. Petitioner admitted that the officer was courteous to him at all times. (Tr. 49). Petitioner further testified that until the time Respondent refused to release him at the jail, he had no complaints with Respondent's behavior. (Tr. 48). Respondent's testimony demonstrated his good faith. Respondent testified that he was called to the scene of the stop by another trooper who had observed Petitioner driving on the interstate without headlights. (Tr. 93). After questioning Petitioner as to how much he had to drink, Respondent advised Petitioner that he was under arrest for D.W.I., driving without headlights, and driving

without a Texas driver's license. (Tr. 96). Respondent advised Petitioner of his rights and explained to him the consequences of taking the breathalyzer test. (Tr. 97). Respondent informed Petitioner that if he passed the test, he would not be booked for D.W.I. and upon passing the breathalyzer test, Respondent did not charge Petitioner with D.W.I. (Tr. 98-103). Respondent did charge Petitioner with driving without headlights and a Texas driver's license.[4] (Tr. 103). Respondent did not issue citations on these charges and release Petitioner because Respondent wanted to ensure Petitioner's appearance in court since he did have a New York driver's license and might leave the state before trial and because Respondent was concerned about Petitioner's intoxicated condition. (Tr. 112-13). At the jail, Respondent inquired whether the magistrate had made his evening jail call and learned that he had already left the jail. (Tr. 115-116). It was Respondent's understanding that the judges would not come to the jail at night other than during their regular jail call. (Tr. 115-116). Respondent further believed that it was his responsibility to take Petitioner before the magistrate if one was available and if one was not available, the sheriff's department would do so when the magistrate became available. (Tr. 117-118). Respondent further testified that he did not personally want to see Petitioner incarcerated overnight in the jail. (Tr. 133). Petitioner did not on appeal challenge Respondent's subjective good faith. The issue on good faith was not raised by Petitioner until the petition for rehearing.

Likewise, Respondent's immunity defense cannot be overruled under the objective prong of the *Wood v.*

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4. Pursuant to settled constructions of Tex. Rev. Civ. Stat. Ann. art. 6701d, §147 and §148(a),"...except for the offense of speeding, an officer may arrest and take into custody one seen committing a traffic offense...," *Tores v. State*, 518 S.W. 2d 738 (Tex. Crim App. 1975); *Wilson v. State*, 511 S.W.2d 531 (Tex. Crim. App. 1974).

Strickland standard. Petitioner has failed to show that the state of the law was contrary to or inconsistent with the action taken by Respondent so as to show objective bad faith. Repondent has contended throughout this litigation that state police officers have authority to make custodial arrests of persons charged with misdemeanor traffic offenses. *Gustafson v. Florida*, 414 U.S. 260 (1973). The Fifth Circuit Court of Appeals has similarly held such arrests are permissible. *United States v. Michel*, 588 F.2d 986 (5th Cir.), *cert. denied*, 444 U.S. 825 (1979); *Myricks v. United States*, 370 F.2d 901 (5th Cir. 1967); and *Mendoza v. United States*, 365 F.2d 268 (5th Cir. 1966). Petitioner has contended that the issue is undecided. In the opinion below, the court considered the issue "at best, a questionable constitutional claim." *Rheaume v. Texas Dept. of Public Safety*, 666F.2d 925, 931 (5th Cir. 1982).

The conclusion that the claim is at best "questionable", confirms that Respondent is entitled to good faith immunity. Where there are no clearly established judicial decisions which prohibit Respondent's actions, he cannot be charged with knowledge that his actions were violative of Petitioner's constitutional rights and is thus entitled to immunity. "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause and being mulcted in damages if he does." *Pierson v. Ray, supra* at 555.

In the instant action, Petitioner sought only monetary relief and such relief is barred by Respondent's official immunity. Thus, there was no reason for the court below to reach the detention issue and there is no reason to do so now.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S FIRST CLAIM AS IT WAS NOT PRESENTED TO THE COURTS BELOW.

It is Petitioner's burden to establish that the substance of his federal constitutional claim has in the first instance been presented to the courts below. *Picard v. Connor,* 404 U.S. 270, 275-78 (1971). The cases are legion that this Court cannot decide issues raised for the first time on petition for writ of certiorari or on appeal and that the Court will not decide federal questions not raised and decided in the court below. *E.G., Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969).

The first question presented by Petitioner concerning the burden of persuasion on the defense of qualified immunity was not raised by Petitioner in proceedings below. At trial, Petitioner neither addressed the issue of the burden of proof on good faith immunity nor presented any evidence to negate such a defense. Thus Petitioner never challenged Respondent's entitlement to official immunity. Likewise on appeal, Petitioner did not contest Repondent's defense of good faith immunity. In his petition for rehearing filed with the Fifth Circuit Court of Appeals, Petitioner for the first time addressed the issue of good faith but not in the context in which it is now raised. Rather, Petitioner contended in his petition that evidence was presented at trial from which it could be inferred that Respondent had acted in bad faith in incarcerating Petitioner. Petitioner did not in the courts below contend that Respondent had failed to meet his burden of proof in regards to his good faith immunity defense. In view of Petitioner's failure to raise the issue, the application for certiorari should be denied for want of jurisdiction. *Cardinale v. Louisiana, supra* at 439.

III.

THERE IS INSUFFICIENT LEGAL AND FACTUAL DEVELOPMENT OF THE ISSUE OF CUSTODIAL DETENTION FOR MISDEMEANOR TRAFFIC OFFENSES FOR PROPER CONSIDERATION OF THE ISSUE.

Before deciding an important question of constitutional law, as the constitutionality of the state statutes relating to brief custodial detention of a narrow class of pretrial detainees in order to bring them before a magistrate, the Court should have the benefit of both a fully developed factual record and the legal analysis of the lower courts. The Court has neither in this case.

Respondent was granted a directed verdict at the close of Petitioner's case in chief. Petitioner failed to offer any evidence concerning Defendent Spier and the evidence Petitioner offered concerning Respondent Saffell made it abundantly clear that Respondent was entitled to the protection of official immunity. Thus Respondent had no opportunity and no reason to present evidence of the state's legitimate interest in its present custodial arrest system. Such evidence is essential to the proper resolution of the issue Petitioner seeks to raise before this Court.

As the Supreme Court has held many times, "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965).

This Court has set forth three factors which are to be

given consideration in determining the dictates of due process in any given situation:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, supra, 424 U.S. at 335.

In light of the foregoing, it is clear that the determination of the time and manner of a hearing to be given an individual who is the subject of a custodial arrest for a misdemeanor traffic offense demands an examination of the particular circumstances surrounding that detention. Evidence of the circumstances surrounding Petitioner's detention is not fully present in the record in the instant action. No reasoned decision as to the propriety of the procedures instituted pursuant to state statute and followed by Respondent can be made absent such evidence.

The legal analysis of the lower courts is also undeveloped. The Fifth Circuit's disposition of the immunity issue made it unnecessary for the court to address Petitioner's "questionable constitutional claim". *Rheaume v. Texas Dept. of Public Safety, supra* at 931. Therefore, no legal analysis exists in the court below as to the propriety of Respondent's actions under the circumstances. The appellate court's refusal to address the constitutional claim where it had an independent ground for affirming the trial court is consistent with the federal judiciary's reluctance to unnecessarily address constitutional issues.

While Petitioner had identified some issues of academic interest which at some time in the future the Court may address, the issues are not properly raised in this case. The Court should decline to consider issues of great moment which are not clearly raised in this case, which also suffers from an inadequate factual and legal record.

CONCLUSION

For the above reasons, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Appendix

APPENDIX A

Tex. Rev. Civ. Stat. Ann. art. 5539a. Limitations on dismissal for want of jurisdiction and refiling action in proper court.

When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of want of jurisdiction of the Trial Court in which such action shall have been filed, and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall in abatement show the first filing to have been in intentional disregard of jurisidiction.